No. 80-500

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1980

THE NEWELL BRIDGE & RAILWAY COMPANY,
a West Virginia Corporation,
Petitioner

v.

RICHARD L. DAILEY,
STATE TAX COMMISSIONER OF WEST VIRGINIA,
Respondent

On Petition For A Writ of Certiorari
To The Supreme Court of Appeals
Of The State of West Virginia

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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The Respondent, Richard L. Dailey, State Tax Commissioner, respectfully prays that the petition for a writ of certiorari to review the judgment and opinion entered in the proceeding by the Supreme Court of Appeals of West Virginia be denied.

QUESTIONS PRESENTED

The Respondent respectfully disagrees with Petitioner's presentation of the questions raised by the Petition for a Writ of Certiorari and feels the following more fairly represents the question presented for review:

May a state impose a direct gross receipts tax upon a business deriving revenues from the operation of a toll bridge facility located on the boundary between the taxing state and another state?

(Answered in the affirmative by the court below. Answered in the negative by the Circuit Court of Kanawha County, West Virginia.)

STATEMENT OF THE CASE

Respondent agrees with Petitioner's statement of the facts of the case, in-

asmuch as the facts were stipulated by the parties (App. 31a). However, Respondent respectfully disagrees with Petitioner's conclusion drawn therefrom when it states: "All of the traffic across the bridge, therefore, is interstate and is involved in interstate commerce." No such fact or conclusion is stipulated and, indeed, no showing has ever been made that any of the traffic is involved in any interstate commerce whatsoever. The most that can be said is that such traffic is travelling between two states, Ohio and West Virginia and vice-versa. Mere personal travel between two states has never been elevated to the status of interstate commerce and Petitioner's statement should be disregarded.

SUMMARY OF ARGUMENT

West Virginia imposes an annual privilege tax against persons (including corporations such as Respondent) measured by values of gross receipts derived from the person's business and other activities within the state. West Virginia realizes its taxing powers are limited by the Commerce Clause of the United States Constitution and, indeed, provides an exclusion from the measure of the tax for gross income derived from commerce between that state and other states in West Virginia Code 11-13-2d. The Supreme Court of Appeals held this provision to be a recitation of the federal Commerce Clause and, accordingly, the federal law an appropriate guide for analysis of the tax and exclusions therefrom. (App. 3a)

The Supreme Court of the United States has spoken clearly and concisely on the question presented in this Petition in at least two cases, Henderson Bridge Co. v. Kentucky, 166 US 150 41 LEd 953, 17 S.Ct. 532 (1897) and Detroit International Bridge Co. v. Corporation Tax Appeal Board, 294 US 83, 79 LEd 777, 55 S.Ct. 332 (1935). These cases are still good law, never having been overruled, and stand squarely for the proposition that the operation of a toll bridge facility which spans a boundary between two states is not interstate commerce and the revenues derived from the bridge operations are not derived from commerce between the states. Respondent asserts that these cases are dispositive of the present controversy and themselves warrant the lower Court's

ruling. However, Petitioner attacks these long-standing propositions and asks this court to overrule the cases.

Should this court reconsider its position now held for at least 80 years, and determine that such toll bridge revenues do constitute "commerce among the several states" to be regulated only by Congress and upon which no states may levy taxes which could burden such commerce wtih multiple and cumulative levies, then the Respondent asserts that the West Virginia tax still does not violate the tests laid down by this Court for such taxes. These tests are set out in Complete Auto Transit v. Brady, 430 US 274, 51 LEd2d 325, 97 S.Ct. 1076 (1977), reh. den. 430 US 976, 52 LEd2d 371, 97 S.Ct. 1669 (1977).

Apparently, Petitioner does not deny

that the West Virginia tax meets the tests of (1) relationship to services provided, and (2) discrimination against interstate commerce, but does contend that the tax violates the tests of (3) sufficient nexus with the state, and (4) fair apportionment. Respondent argues that the test of nexus is met since the corporation admittedly avails itself of the substantial privilege of carrying on business within West Virginia and indeed is domiciled within West Virginia, has many physical assets located therein, and pays other taxes to West Virginia. See Exxon Corp. v. Wisconsin Dept. of Revenue, ____ US ____ , 65 LEd 2d 66, 100 S.Ct _____, (1980); Mobil Oil Corp. v. Commr. of Taxes, ____ US ____, 63 LEd 2d 510, 100 S.Ct. 1223 (1980); Wisconsin v. J.C.

Penny Co., 311 US 435, 85 LEd 267, 61 S.Ct. 246, 130 ALR 1229 (1940).

Further, Respondent argues that the test of fair apportionment has been met inasmuch as Petitioner has made no showing that Ohio, the only other state involved, imposes any similar tax whatsoever. Actual multiple taxation must be shown to establish an assertion that a state's taxing statute subjects an interstate business to an unfair burden of multiple taxation. Exxon, supra; Mobil, supra. Consequently, Petitioner's petition for a writ of certiorari should be denied.

ARGUMENT

I. A STATE MAY IMPOSE ITS TAXES UPON THE OPERATIONS OF A TOLL BRIDGE LOCATED ACROSS THE BOUNDARY LINE BETWEEN TWO STATES AS SUCH BUSINESS IS NOT INTER-

STATE COMMERCE EXEMPTED FROM STATE TAXATION BY THE COMMERCE CLAUSE TO THE UNITED STATES CONSTITUTION.

Under the authority of West Virginia Code §11-13-2d (App.22a) the Respondent, State Tax Commissioner of West Virginia, imposed the West Virginia business and occupation tax, a gross receipts or privilege tax measured by the value or dollar amount of revenue derived from a person's or corporation's business and other activities conducted within the state. In Petitioner's situation, the tax was imposed upon the total dollar amount of Petitioner's gross receipts from toll charges collected by it from its operation of a toll bridge which spans the Ohio River between West Virginia and Ohio.

Article I, Section 8 of the Constitution of the United States, the Commerce Clause, provides generally that only Congress shall have the power to regulate commerce among the several states. It is interesting to note that the Commerce Clause does not contain the words "interstate commerce", which unfortunately have taken on a meaning far in excess of their true import. While implying an almost untouchable, and hence untaxable, quality when used in the constitutional sense, the words actually mean little more than commerce which takes place in or between two states. Indeed Webster's New Collegiate Dictionary, 1975, defines "interstate" as "of, connecting, or existing between two or more states esp.(sic) of the U.S."; an example given is "an inter-

state highway." Elevating the term "interstate commerce" to a proscription against taxation altogether anytime any commercial activity happens to cross a state boundary line hardly adds meaning or enlightenment to a taxing situation. Examples are Petitioner's use of the word "interstate" in describing its corporate business, such as "purely interstate revenues", "interstate toll bridge", and "interstate traffic." The most that can be truly gleaned from the facts of this situation are that the Petitioner, a corporation operating a business much like any other, owns a bridge which spans a river which happens to contain the boundary line between two states, West Virginia and Ohio, and hence the vehicular traffic utilizing Petitioner's corporate franchise, and

from which it derives its gross revenues, must be travelling from one state to another and must, of course, pass over that boundary line. How these facts elevate the Petitioner's corporate income to the level of constitutionally protected commerce, free from the states taxing power is simply not apparent. What is apparent is a state's perogatives in imposing its taxing scheme on those that come within its bailiwick. This is not to say that the commerce clause's import is easily understood. Indeed, the vast quantity of litigation engendered by the Clause over the past century points that out. However, certain principles of law have been made clear and the matter of taxation of the business of operating a toll bridge over a river serving as the boundary between

two states is one of those situations.

One of the earliest cases concerning a tax on tolls collected on a bridge over which interstate commerce flowed is New York, Lake Erie & Western Railroad Company v. Pennsylvania, 158 U.S. 431 (1895). The State of Pennsylvania imposed a tax on the gross receipts received by the Erie Railroad from tolls paid by other railroad companies for the use of its railroad tracks located within the State. Much of the traffic over the Erie Railroad's Pennsylvania tracks was itself interstate in nature. The railroad company also owned tracks in other states although use of these tracks was not subject to the tax. The Supreme Court held that the tax did not conflict with the Commerce Clause. In holding the tax on the gross receipts

from tolls valid, the Court noted:

> "It is argued that the imposition of a tax on tolls might lead to increasing them in an effort to throw their burthen on the carrying company. Such a result is merely conjectural, and, at all events, too remote and indirect to be an interference with interstate commerce. The interference with the commercial power must be direct, and not the mere incidental effect of the requirement of the usual proportional contribution to public maintenance."

Henderson Bridge Co. v. Kentucky, 166 U.S. 150, 17 S.Ct. 532, 41 L.Ed. 953 (1897), involved an action brought by the Commonwealth of Kentucky against the Henderson Bridge Company to recover taxes levied against the company on an assessment made of its intangible property by the Kentucky Board of Valuation and Assessment for the year 1893. The Henderson Bridge Company owned and operated a bridge across the Ohio River from Henderson, Kentucky to the Indiana

shore. The company paid the tax on its tangible property but refused to pay tax on its intangible property. In sustaining the Kentucky Court's action, in granting judgment for the tax, the Supreme Court of the United States stated, 166 U.S. at p. 153:

> "Clearly the tax was not a tax on the interstate business carried on over or by means of the bridge, because the bridge company did not transact such business. That business was carried on by the persons and corporations which paid the bridge company tolls for the privilege of using the bridge. The fact that the tax in question was to some extent affected by the amount of the tolls received, and therefore might be supposed to increase the rate of tolls, is too remote and incidental to make it a tax on the business transacted. This very question was decided in New York, L.E. & W.R. Co. v. Pennsylvania, 158 U.S. 431, 439..."

The same toll bridge was the subject of another Supreme Court of the United States case in Henderson Bridge

Co. v. City of Henderson, 173 U.S. 592, 43LEd 823 (1899). This case arose out of the ad valorem taxation by the city of Henderson, a municipal corporation of Kentucky, of the bridge property located on the Kentucky side and across the Ohio River to the low water mark on the Indiana shore. Various constitutional issues were raised and considering the Commerce Clause question the Supreme Court of the United States stated, 173 U.S. at page 173:

> "Nor does the fact that the bridge between low-water mark on either side of the river is used by the corporation controlling it for purposes of interstate commerce exempt it from taxation by the state within whose limits it is permanently located. The state cannot by its laws impose direct burdens upon the conduct of interstate commerce carried on over the bridge. But, as the decisions of this court show, it may subject to taxation property permanently located within its territorial limits and employed in

> such comerce by individuals and by private corporations. In Covington & C. Bridge Co. v. Kentucky, 154 U.S. 204, 212, it was said: 'As matter of fact, the building of bridges over waters dividing two states is now usually done by congressional sanction. Under this power the state may also tax the instruments of interstate commerce as it taxes other similar property, provided such tax is not laid upon the commerce itself.' See also Henderson Bridge Co. v. Henderson City, 141 U.S. 679, 689; Pittsburgh C. C. & St. L. Railway Co. v. Board of Public Works, 172 U.S. 32."

See also Henderson Bridge Co. v. City of Henderson, 141 U.S. 679, 35 LEd 900 (1891).

In Detroit International Bridge Co. v. Tax Board, 294 U.S. 79 55 S.Ct. 332, 79 L.Ed. 777 (1935), the Michigan Secretary of State imposed a privilege tax on the Detroit International Bridge Company which owned and operated a toll bridge for pedestrians and vehicles across the Detroit River from Detroit,

Michigan to Sandwich, Province of Ontario, Canada. The privilege tax was an annual fee upon each dollar of a corporation's paid up capital and surplus, with none of the capital or surplus of the corporation represented by property exclusively used in interstate commerce being used in the computation of the tax. The Michigan Supreme Court sustained the tax and the United States Supreme Court in affirming the Michigan Court's decision noted, 294 U.S. at p. 85, that the record disclosed that the Detroit International Bridge Company:

> "* * * conveys no persons or goods across the international boundary line. It merely collects tolls from such persons as use it (the bridge). It provides an instrumentality which others may use in conducting foreign commerce."

Finding that the ownership and operation of the bridge did not constitute foreign

commerce the Court cited the Henderson case. At p. 86 the Supreme Court stated:

> "Clearly the tax was not a tax on the interstate business carried on over or by means of the bridge, because the bridge company did not transact such business. That business was carried on by the persons and corporations which paid the bridge company tolls for the priviledge of using the bridge."

Keokuk & Hamilton Bridge Co. v. Illinois, 175 U.S. 626, 44 2Ed. 299 (1900), concerned a bridge over the Mississippi River between Illinois and Iowa. Illinois imposed a capital stock tax. Against an interstate commerce question challenge, the Supreme Court of the United States summarily upheld the tax on the basis of its holding in Henderson Bridge Co. v. Kentucky, 166 U.S. 153, 41 L.Ed. 954, 17 S.Ct. 533 (1897).

A bridge over the Ohio River from

West Virginia to Ohio was the subject matter of Pittsburgh, C.C. & St. L. R. Co. v. Board of Public Works, 172 U.S. 32, 43 L.Ed. 354 (1898). There the Supreme Court dismissed an attempt to enjoin a West Virginia property tax on the bridge.

The general rule of law is set out in Am. Jur. 2d, 71 State & Local Taxation, Section 425, "Bridges and ferries." The maintenance and operation of a bridge across a state or national boundary does not constitute interstate or foreign commerce; consequently, state taxation of the business of the person or corporation maintaining or operating it is not invalid under the commerce clause of the Federal Constitution. (Citing Detroit International Bridge Co., supra, and Keokuk & Hamilton Bridge

supra.)

It is noteworthly that none of the bridge tax cases have been overturned or their legal premises questioned in any of the following generations of interstate commerce cases.

The case of Overstreet v. North Shore Corporation, 318 U.S. 125, 63 S.Ct. 494, 87 L.Ed. 656 (1943), indicates that there has been no recent change in the thinking of the Supreme Court on the question of taxation of bridge tolls. In Overstreet, the question involved was whether the petitioners (ironworkers) who were engaged in maintaining and operating respondent's toll road and a chain bridge over a navigable waterway which admittedly together constituted a medium for the interstate movement of goods and persons, were engaged in com-

merce within the meaning of the Fair Labor Standards Act. At 318 U.S. p. 131, the Supreme Court discussed the Henderson Bridge Company v. Kentucky, supra, and Detroit International Bridge Company, supra, cases:

> "The Henderson Bridge Co. and Detroit International Bridge Co. cases, supra, do not affect our conclusion. We have pointed out that decisions such as those, dealing with various assertations of state or federal power in the commerce field, are not particularly helpful in determining the scope of the Act.* * * But even if we accept the premise of the Bridge Cases and regard respondent as not engaged in commerce, the result is not changed. The nature of the employer's business is not determinative, because as we have repeatedly said, the application of the Act depends upon the character of the employees' activities. * * * The fact that respondent may be subject to state taxation does not imply that it is free from federal regulation or that its road and drawbridge are not instrumentalities of interstate commerce. Petitioners, who are engaged in operating and maintaining respondent's facilities so that there may be interstate

> passage of persons and goods over them, are so closely related to that interstate movement as a practical matter that we think they must be regarded, under the allegations of their complaint, as 'engaged in commerce' within the meaning of §§ 6 and 7 of the Act." (Emphasis supplied.)

Detroit International Bridge, supra, and Henderson Bridge Co., supra, were cited with approval in Fisher's Blend Station, Inc., 297 U.S. 650 (1936).

It has been the law of the land for well over eighty years that toll bridges between states are not themselves engaged in interstate commerce. This is an unbroken sequence of cases never reversed nor questioned. The many cases on interstate commerce which have succeeded these "bridge" cases do not apply for here no interstate commerce has taken place and therefore no question of burdening interestate commerce can arise.

It is the position of the Respon-

dent that the operation of a toll bridge and the collection of tolls from motor vehicles passing over the bridge is not an interstate activity governed by the Commerce Clause of the United States Constitution, since the bridge facility is not itself engaged in any interstate business transactions. The motor vehicles passing over the bridge may or may not be engaging in interstate commerce. Vehicles being used for personal travel would not be engaged in interstate commerce though they would be traveling between states. Those motor vehicles engaged in business activity might well be engaged in interstate commerce. But, simply being engaged therein does not exempt them and their business activities from all forms of fees and taxation, especially not the fees

imposed by a toll bridge facility the vehicles may pass over on their journey. The toll bridge's role in the personal travel and the commercial travel is that of a mere conduit for the travel, facilitating its flow, but not a part of the personal reasons for those engaged in the personal travel nor a part of the commercial transactions of the commercial traffic. Thus, to contend that a toll bridge business which collects toll charges from motor vehicles engaged both in person and commercial traffic, some of which may be interstate commerce and part of the interstate commerce of which may be partially exempt from some taxes, is engaged in interstate commerce and as such is totally exempt from taxation, is patently wrong. It is evident that the only possible connection with interstate

commerce is the commerce which happens to pass over the bridge. Petitioner presented no evidence at the administrative level below to prove that any of the traffic over the bridge is indeed engaged in interstate commerce, nor even what portion of the normal everyday traffic is of the common commercial variety, i.e., trucks, business, or farm vehicles. Petitioner presented no evidence that additional tolls would necessarily be imposed on the commercial traffic due to the imposition of a tax, nor did Petitioner present evidence that such additional tolls would present an unwarranted burden on the commercial traffic. Nothing in the record shows that the tax on the tolls would constitute a "regulation" of the commercial traffic by the State of West Virginia.

In fact, if the toll itself is not a burden on that portion of the traffic which is commercial traffic (which may only be partially exempt from taxation as being engaged in interstate commerce) how can a tax on the toll bridge business which collects the toll even remotely be a burden on that exempt portion? The very notion is farfetched. The business being taxed is not protected by the Commerce Clause of the United States Constitution. West Virginia has every right to lay its taxes upon the bridge tolls.

The principles gleaned from these cases and which can be applied directly to Petitioner's corporate business activities are clear. First, a tax on a toll (which is not a burden on interstate commerce) can hardly be a burden

on the commerce. New York, Lake Erie & Western Railroad v. Pennsylvania, supra. Secondly, any interstate commercial activity is carried on, if at all, by those travelling over the bridge not by the bridge itself. Henderson Bridge Co. v. Kentucky, supra and Detroit International Bridge Co. v. Tax Board, supra.

II. WHERE THERE IS NO ACTUAL SHOWING BY THE TAXPAYER THAT IT IS ACTUALLY BEING SUBJECTED TO MULTIPLE OR CUMULATIVE TAXES UPON THE SAME INCOME, A STATE TAX NEED NOT BE OTHERWISE APPORTIONED TO MEET THE REQUIREMENT OF FAIR APPORTIONMENT UNDER COMPLETE AUTO TRANSIT V. BRADY.

The Supreme Court of Appeals of West Virginia rendered its decision solely upon the law as set out in I,

(App.3a), deciding solely that the Petitioner was not engaged in interstate commerce. Respondent asserts, however, that if this Court overrules the long line of bridge tax cases and holds that a toll bridge which crosses a state boundary line is indeed engaged in commerce subject to the proscription of the Commerce Clause, the West Virginia tax will remain a valid imposition of a state's taxing power under the rules set down by this Court.

Assuming the bridge cases to be overruled, Petitioner attacks the West Virginia tax on two grounds. First, the tax is unapportioned and secondly the tax fails the nexus test. Apparently, Petitioner does not assert that the tax violates the other two tests set out in Complete Auto Transit v.

Brady, 430 U.S. 274, 51 L.Ed.2d 326, 97 S.Ct. 1076 (1977), reh. den 430 U.S. 976, 52 L.Ed.2d 371, 97 S.Ct. 1669 (1977), those being that the tax discriminates against interstate commerce or that it is unrelated to services provided by the State of West Virginia.

The apportionment test requires that the tax be fairly apportioned. This is not to say that the tax must contain an apportionment formula, such as was considered in Moorman Mfg. Co. v. Bair, 457 U.S. 267, 57 LEd2d 197, 98 S.Ct. 2340 (1978). The tax may well be unapportioned as in Standard Pressed Steel Co. v. Wash. Rev. Dept., 419 U.S. 560, 42 LEd2d 719, 95 S.Ct. 706 (1975). In any event, the ultimate vice in a tax on gross receipts of an enterprise doing an interstate business is the risk of

multiple or cumulative taxation. Standard Pressed Steel Co. v. Wash. Rev. Dept., supra. Carried to its extreme, a business operating in everyone of the United States could be subject to fifty gross receipts taxes on its gross receipts and if each state imposed a two percent tax, the taxes would take the entire 100% of gross receipts. On a practical basis, however, even the imposition of identical taxes by two states would violate the Commerce Clause proscription against burdening commerce among the states.

The many cases which have considered the question point out that it is necessary that more than one state actually impose the taxes; the mere risk that two or more states could impose identical taxes on the same gross

income will not cause the test to be violated. In Standard Pressed Steel Co. v. Wash. Rev. Dept., supra, the Court stated, 42 LEd2d at p. 723:

> "We noted in General Motors that a vice in a tax on gross receipts of a corporation doing an interstate business is the risk of multiple taxation; but that the burden is on the taxpayer to demonstrate it, ((General Motors Corp. v. Wash., 377 U.S. 436, 12 LEd2d 430, 84 S.Ct. 1564 (1964), 377 U.S. at)) 449, 12 LEd2d 430. The corporation made no such showing there nor is any effort made to establish it here."(Emphasis supplied).

See also Mobil Oil Corp. v. Comm'r. of Taxes, ___U.S.___, 63 LEd2d 510, 100 S.Ct. ____, (1980), where the Supreme Court analyzed a similar assertion to that of the Petitioner in this case.

> "Appellant asserts that Vermont's tax is discriminatory because it subjects interstate business to a burden of duplicative taxation that an intrastate taxpayer would not bear. Mobile does not base this claim on a comparison of Vermont's

> apportionment formula with those used in other States where appellant pays income taxes. Rather, it contends that any apportioned tax on its dividends will place an undue burden on that specific source of income, because New York the State of commercial domicile, has the power to tax dividend income without apportionment. Inasmuch as New York does not presently tax the dividends in question, actual multiple taxation is not demonstrated on this record. (Citations omitted)."

The argument that there need be merely the risk of multiple taxation versus an actual showing of two or more identical taxes imposed upon the same income, was again asserted in Exxon Corp. v. Wisconsin Dept. of Rev., ___ U.S. ___ 65 LEd2d 66, 100 S.Ct. ____ (1980) and again the Supreme Court rejected the theory. See 65 LEd2d at p. 84 "... actual multiple taxation has not been shown.", with a discussion at footnote 12.

As to Petitioner's situation, there is no doubt that the West Virginia Business and Occupation tax contains no apportionment formula which would apply. Thus, the apportionment issue must be addressed based upon the principles brought out in the cases as cited above. The test of apportionment is not a single question test. There are at least three questions to be asked in any situation if the tax is to fail the test and, consequently, fail the constitutionality issue. The first question is whether the tax is applied solely to the intrastate activities or property of the taxpayer. If so, then the tax passes since it does not burden interstate commerce. If not, then the second question must be asked. The second question is whether the tax subjects the

interstate commerce to the risk of cumulative or multiple taxation. If not, the tax passes the test. However, if the tax is in fact imposed by two or more states, the third question must be asked. The third question is whether the tax is fairly apportioned. If the taxing statute contains an apportionment formula then the state imposing the tax can only receive its fair share of each percent of the tax. If the statute contains no apportionment formula the tax fails the test.

In Petitioner's case, the first question is answered in the negative since the West Virginia business and occupation tax is being imposed on the total gross receipts, not just receipts from West Virginia business. Thus, the second question must be asked. And,

here is where the tax passes muster, as Petitioner has made no showing whatsoever, nor even has it ever alleged, that there are two taxes being imposed upon Petitioner's gross receipts for the periods sought to be taxed.

There is no Ohio tax like the West Virginia business and occupation tax. The "second question" asked under the apportionment test is answered in the negative: "No, the tax does not subject the taxpayer to multiple or cumulative tax burdens since only one of the two possible taxing states imposes the tax." Therefore, the third question--whether an apportionment formula exists--need not be asked. The tax has passed constitutional muster.

III. A DOMICILIARY CORPORATION DOING BUSINESS AND HAVING SUBSTANTIAL ASSETS

WITHIN A STATE MEETS THE NEXUS TEST OF COMPLETE AUTO TRANSIT v. BRADY.

Petitioner also asserts that the West Virginia tax fails to meet the nexus test of Complete Auto Transit v. Brady, supra. This test asks whether there is sufficient nexus between the taxing state and the business sought to be taxed to impose the tax. The facts show that Petitioner is a domicilary corporation of West Virginia as it was incorporated in West Virginia and maintains its corporate offices within West Virginia. The bridge, the corporation's main asset and the revenues from which are the subject of this controversy, is located two-thirds within the state of West Virginia (App. 31a). This established nexus in Wash. Rev. Dept. v. Stevedoring Ass'n. 435 U.S. 734, 55

LEd2d 682, 98 S.Ct. 1388 (1978), where the Court reasoned:

> "The record contains nothing that minimizes the obvious nexus between Washington ((the taxing state)) and respondents ((the taxpayers)); indeed, respondents conduct their entire Stevedoring operations within the state."

In Exxon Corp. v. Wisconsin Dept. Rev., supra, the Court reinterated the nexus test, thusly:

> "The nexus is established if the corporation 'avails itself of the ''substantial privilege of carrying on business'' within the State.' Mobile Oil Corp. v. Commissioner of Taxes, supra, at ___ 63 L Ed 2d 510, 100 S.Ct. 1223, quoting Wisconsin v. J. C. Penney Co., 311 U.S. 435, 444-445, 85 L Ed 267, 61 S.Ct. 246, 130 ALR 1229 (1940). In the present case, Exxon does not dispute that it avails itself of that privilege through its marketing operations within Wisconsin."

65 LEd2d at p. 79.

The same is true for Petitioner herein. Petitioner not only avails itself of the privilege of carrying on

operations within West Virginia, but is substantially located therein. As the Court stated in Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 3 LEd 2d 421, 79 S.Ct. 357 (1959), 3 LEd2d at p. 431:

> "It strains reality to say, in terms of our decisions, that each of the corporations here was not sufficiently involved in local events to forge 'some definite link, some minimum connection' sufficient to satisfy due process requirements."

The nexus test is met by the West Virginia tax and therefore all four tests of constitutionality have been met. Accordingly, Petitioner's activities are properly subject to the West Virginia business and occupation tax as was decided by the Court below.

The tests which Petitioner sets out from Cooney v. Mountain State Tele-

phone & Telegraph Co., 294 U.S. 384, 79 LEd 934, 55 S.Ct. 477 (1935), are no longer the tests by which taxes are measured against the Commerce Clause. The tax in Cooney would probably pass muster under the Complete Auto Transit v. Brady, supra, tests.

Petitioner cites Memphis National Gas v. Stone, 335 U.S. 80, 92 LEd 1832, 68 S.Ct. 1475 (1948) for the proposition that the local incidents which are used to establish nexus must not be ones which could be used by another state to repeat the exaction of a similar tax. But, in Petitioner's case, it could hardly be true that the incidents of domicile, location of corporate office, and the fact that two-thirds of the bridge is physically located within West Virginia, could be used by Ohio.

Ohio could use the other one-third of the bridge, but that is not an incident which West Virginia relies upon anyway.

CONCLUSION

Respondent's Brief in Opposition to Petitioner's Petition for a Writ of Certiorari has demonstrated that the Supreme Court of Appeals of West Virginia correctly applied the law in regard to the imposition of state taxes upon the gross receipts of a corporation owning a bridge across the boundaries of two states. For at least forty-five years the law has been clear in allowing the imposition of state taxes upon such income. No later case has eroded that rule. Two things can be said of older cases, such as Henderson Bridge v. Kentucky, supra, and Detroit International Bridge Co. v. Corporation Tax

Appeal Board, supra. They are either "outdated, outmoded and out of step with modern times" or they are "venerable, unquestionally the law of the land and solid authority for their propositions." The Respondent respectfully suggests these cases are the latter, never having been overruled in forty-five years (or eighty-three for that matter).

Should this Court overrule its prior cases and find that the corporation is engaged in interstate commerce, the tax is, nevertheless, proper under the Commerce Clause since none of the tests of constitutionality set out in Complete Auto Transit v. Brady, supra, are violated by the imposition of the West Virginia business and occupation tax upon the corporate receipts. The tests of discrimination against inter-

state commerce and fair relations to the services rendered by the State of West Virginia are not contested. The nexus test is met by the facts (stipulated) that the corporation is a West Virginia corporation, has its principal office in West Virginia, has its principal asset (the bridge) physically located located two-thirds within the State of West Virginia, owns property within West Virginia, and pays other West Virginia taxes. The apportionment test is met, albeit by default, since Ohio, the only other state the corporation could conceivably be held to be doing business in with respect to the toll charges, does not have any gross receipts tax remotely similar to the West Virginia business and occupation tax and no showing has been made that Ohio's taxing

scheme otherwise amounts to such a tax. The test requires multiple taxation by the same type tax in at least two states; that is two taxes on the same class of income, for the same taxing period, and imposed upon the same entity. The test is met in Petitioner's situation.

For these reasons, the Respondent respectfully requests that the Petition for Writ of Certiorari be refused.

Respectfully Submitted,

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